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No. 95-2074

In The
Supreme Court Of The United States

October Term, 1996

City of Boerne,
Petitioner,

v.

P.F. Flores, Archbishop of San Antonio, and
the United States,
Respondents.

On Writ Of Certiorari to the
United States Court of Appeals for The Fifth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST

The intent of this brief is less to persuade than to illumine; less to argue than to display. Its purpose is narrow: (1) to shed light on the significance of the words **religion** and **conscience** used by the First Congress and (2) to demonstrate how they were understood by those in the states legislatures that ratified. The approach is, in large part, linguistic. It involves digging out the seventeenth and eighteenth century use of words so that we can read them in the idiom of the era when the amendment was adopted.

The only question here addressed is the third that was put in the order granting certiorari, viz. "Did Congress violate Establishment Clause of First Amendment by broadly and exclusively privileging **religion** over other expressions of **conscience**?"

This amicus has for many decades been actively concerned in combined matters of religion, the church, linguistics, and the history of the Constitution. As his contribution to the Bicentennial Year, in 1991 he published "The Language of the Constitution, a Sourcebook and Guide to the Ideas, Terms, and Vocabulary Used by the Framers of the United States Constitution" (foreword by Chief Justice Warren E. Burger) (Greenwood Press, Westport, CT. In print.). This brief is filed pro bono publico for the purpose of defending the Constitution against a flank attack.

SUMMARY OF ARGUMENT

William Blackstone's "Commentaries on the Laws of England" were published some twenty years before adoption of the Bill of Rights. In discussing statutory explication, he observed:

> Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. (Vol. I, page 59)

Examination of the records, and of the linguistic authorization of the day, reveal how "religion" and "conscience" were separated.

The pre-consitution organic laws of most of the several states coupled rights of religion and of conscience with a single yoke. The Bill of Rights changed that. "Conscience" was excised.

In the first congress, the House of representatives initially proposed that rights of **conscience** be protected along with those of **religion**. But the Senate would not agree, and the House receded.[1] Four or five generations had passed since the charters of Charles II to Carolina and Rhode Island had coupled **religion** and **conscience**; the yoke broke in August of 1791 when the House agreed with the Senate to drop "conscience" for reasons unknown. Vagueness in the meaning of the word might have been reason enough. But freedom of "conscience," desirable or not, is not constitutionally protected.

ARGUMENT

What does the term "exercise of religion" mean as used in the statute? As stated in the Code, chapter 21B, section 2000bb-2(4) it means the same

[1] Documentary History of the First Congress of the United States Congress, Senate Legislative Journal, Johns Hopkins University Press, 1972, pages 136 and 189. Details follow under "The First Congress," page 20.

as in the First Amendment. Thus we must go back to find out how "religion" was understood by those in the first congress and in the state ratifying conventions when the Bill of Rights was ratified in 1791. Today's technology furnishes us better insight than we have had before, with promise of more accurate perspective and sharper focus.

1. Lexicological Background

Several publications contemporaneous with the late eighteenth century are helpful in understanding the meanings of "religion" and "conscience" as used at that time. To these definitions, "church" has been added because of its close relationship to religion. Also, frequent confusion seems to result from popular but misleading metaphors such as "church and state." Although sometimes used in debates, "church" nowhere appears in the Constitution.

The Encyclopedia Britannica, or a Dictionary of Arts and Sciences, published in Scotland in 1771, has a fourteen-page (533 through 546) article in Volume III entitled "Religion, or Theology." (The two were equated. On page 895, the entry for Theology says merely "See RELIGION.") The subject is defined thus in the first paragraph: [Modern "s" has been substituted for old-fashioned "f" in the original text.]

> I. To know God, and to render him a reasonable service, are the two principal objects of religion. We know but little of the nature of bodies; we discover some of their properties, as motion, figure, colours &c. but of their essence we are ignorant: we know still much less of the

soul; but of the essence or nature of God, we know nothing: it is the prerogative of the Supreme Being alone to comprehend his own essence: all the efforts that we can make to attain that knowledge, are arrogant and ineffectual; it is foreign to the nature of a limited spirit: but our destiny is that of a man, and our desires are those of a God. In a word, man appears to be formed to adore, but not to comprehend, the Supreme Being.

Samuel Johnson in his 1773 Dictionary says only this:

Religion

1. Virtue, as founded upon reverence of God, and expectation of future rewards and punishments.

2. A system of divine faith and worship as opposite to others.

Noah Webster, in his 1828 dictionary, says:

RELIGION, n. [This word seems originally to have signified an oath or vow to the gods, or the obligation of such an oath or vow, which was held very sacred by the Romans.]

1. Religion, in its most comprehensive sense, includes a belief in the being and perfections of God, in the revelation of his will to man, in man's obligation to obey his commands, in a state of reward and punishment, and in man's accountableness to God; and also true godliness or

piety of life, with the practice of all moral duties. It therefore comprehends theology, as a system of doctrines or principles, as well as practical piety; for the practice of moral duties without a belief in a divine lawgiver, and without reference to his will or commands, is not religion.

2. *Religion*, as distinct from *theology*, is godliness or real piety in practice, consisting in the performance of all known duties to God and our fellow men, in obedience to divine command, or from love to God and his law. James i.

Religion will attend you–as a pleasant and useful companion, in every proper place and every temperate occupation of life. *Buckminster.*

3. *Religion*, as distinct from *virtue*, or *morality*, consists in the performance of the duties we owe directly to God, from a principle of obedience to his will. Hence we often speak of *religion* and *virtue*. as different branches of one system, or the duties of the first and second tables of the law.

Let us with caution indulge the supposition, that morality can be maintained without *religion*. *Washington.*

4. Any system of faith and worship. In this sense, religion comprehends the belief and worship of pagans and Mohammedans, as well as of christians; any religion consisting in the belief of a

superior power or powers governing the world, and in the worship of such power or powers. Thus we speak of the *religion* of the Turks, of the Hindoos, of the Indians, &c. as well as of the christian *religion*. We speak of *false religion*, as well as of *true religion*.

5. The rites of religion; in the plural.
Milton

Conscience is defined thus by Noah Webster (op. cit.):

CONSCIENCE, n.
1. Internal or self-knowledge, or judgment of right and wrong; or the faculty, power or principle within us, which decides on the lawfulness or unlawfulness of our own actions and affections, and instantly approves or condemns them.

Conscience is called by some writers the *moral sense*, and considered as an original faculty of our nature. Others question the propriety of considering conscience as a distinct faculty or principle. They consider it rather as the general principle of moral approbation or disapprobation, applied to one's own conduct and affections; alledging that our notions of right and wrong are not to be deduced from a single principle or faculty, but from various powers of the understanding and will.
Encyc. Hucheson. Reid. Edin. Encyc.

Being convicted by their own *conscience*, they went out one by one. John viii.

The *conscience* manifests itself in the feeling of obligation we experience, which precedes, attends and follows our actions. *E.T. Fitch.*

Conscience is first occupied in ascertaining our duty, before we proceed to action; then in judging of our actions when performed. *J.M. Mason*

2. The estimate or determination of conscience; justice; honesty.

What you require cannot, in *conscience* be deferred. *Milton.*

3. Real sentiment; private thoughts; truth; as, do you in *conscience* believe the story?

4. Consciousness; knowledge of our own actions or thoughts.

The sweetest cordial we receive at last,
Is *conscience* of our virtuous actions past. *Denham.*

[This primary sense of the word is nearly, perhaps wholly obsolete.]

5. Knowledge of the actions of others.
B. Jonson.

6. In *ludicrous language*, reason or reasonableness.

Half a dozen fools are, in all *conscience*, as many as you should require. *Swift.*

To make conscience or *a matter of conscience*, is to act according to the dictates of conscience, or to scruple to act contrary to its dictates. *Locke. Court of conscience,* a court established for the recovery of small debts in London and other trading cities and districts.

Blackstone.

Church is defined thus by Noah Webster (op. cit.):

CHURCH, n.

1. A house consecrated to the worship of God, among christians; the Lord's house.

2. The collective body of christians, or of those who profess to believe in Christ, and acknowledge him to be the Savior of mankind. In this sense, the church is sometimes called the *Catholic* or *Universal Church.* *Johnson. Encyc.*

3. A particular number of christians, united under one form of ecclesiastical government, in one creed, and using the same ritual and ceremonies; as the English *church*; the Gallican *church;* the Presbyterian *church;* the Romish *church;* the Greek *church.*

4. The followers of Christ in a particular city or province; as the *church* of Ephesus, or of Antioch.

5. The disciples of Christ assembled for worship in a particular place, as in a private house. Col. iv. [See No. 9.]
6. The worshipers of Jehovah or the true God, before the advent of Christ; as the Jewish *church*.

7. The body of clergy, or ecclesiastics, in distinction from the laity. Hence, ecclesiastical authority. *Encyc.*

8. An assembly of sacred rulers convened in Christ's name to execute his laws. *Cruden. Brown.*

9. The collective body of christians, who have made a public profession of the christian religion, and who are united under the same pastor; in distinction from those who belong to the same parish, or ecclesiastical society, but have made no profession of their faith.

2. Organic Laws[2]

RFRA §200 bb-2 reads: As used in this chapter (4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

[2] Reference to Thurston Greene, The Language of the Constitution, A Sourcebook and Guide to the Ideas, Terms, and Vocabulary Used by the Framers of the United States Constitution. See page 1 hereof, third paragraph. Pages 666 through 687.* References therein to "Thorpe" are to Francis Newton Thorpe, The Federal & State Constitutions, Colonial Charters, & Other Organic Laws. . ., 7 volumes (House Document No. 357, U.S. Government Printing Office: Washington, D.C.) (1909-1911). Page numbers are continuous throughout the seven volumes.

There follows a step-by-step review of the organic laws of the colonies, showing that "conscience" was much in the minds of the pre-constitution founders. The word was surely well known to members of the First Congress.

Charles II, Charter of Rhode Island, July 8 1663:

> . . . that all and everye person and persons may, from tyme to tyme, and at all tymes hereafter, freelye and fullye have and enjoye his and theire owne judgments and **consciences**, in matters of **religious** concernments, throughout the tract of lande hereafter mentioned. . .
> [Thorpe 3213]

Charles II, Charter of Carolina, June 30,1665:

> And that no person or persons unto whom such liberty shall be given, shall be any way molested, punished, disquieted, or called in question, for any differences in opinion, or practice in matters of **religious** concernments, who do not actually disturb the civil peace of the province, county or colony, that they shall make their abode in: But all and every such person and persons may, from time to time, and at all times, freely and quietly have and enjoy his and their judgments and **consciences**, in matters of **religion**, throughout all the said province or colony they behaving themselves peaceably, and not using this liberty to licentiousness, nor to the

civil injury, or outward disturbance of others: .... [Thorpe 2771]

Pennsylvania Constitution, September 2, 1790:

> [Article IX, Section 3:] That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own **consciences**; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; that no human authority can, in any case whatever, control or interfere with the rights of **conscience**; and that no preference shall ever by given, by law, to any **religious** establishments or modes of worship. [Thorpe 3100]

Fundamental Constitutions of West New Jersey, 1676:

> [Chapter 16:] That no men, nor number of men upon earth, hath power or authority to rule over men's **consciences** in **religious** matters, therefore it is consented, agreed and ordained, that no person or persons whatsoever within the said Province, at any time or times hereafter, shall be any ways upon any pretence whatsoever, called in question, or the least punished or hurt, either in person, estate, or priviledge, for the sake of his opinion, judgment, faith or worship towards God

in matters of **religion**. But that all and every such person, and persons, may from time to time, and at all times, freely and fully have, and enjoy his and their judgments, and the *exercises* of their **consciences** in matters of **religious** worship throughout all the said Province. [Thorpe 2549]

Carolina Proprietors, Declaration and Proposals, August 25, 1663:

> [Article 5:] We will grant, in as ample manner as the undertakers shall desire, freedom and liberty of **conscience** in all **religious** or spiritual things, and to be kept inviolably with them, we having power in our charter to do so.
>
> [Thorpe 2755]

New Jersey Proprietors, Concession and Agreement, February 10, 1664:

> That no person qualified as aforesaid within the said Province, at any time shall be any ways molested, punished, disquieted or called in question for any difference in opinion or practice in matter of **religious** concernments, who do not actually disturb the civil peace of the said Province; but that all and every such person and persons may from time to time, and at all times, freely and fully have and enjoy his and their judgments and **consciences** in matters of **religion** throughout the said province they behaving themselves peaceably and

quietly, and not using this **liberty** to licentiousness, nor to the civil injury or outward disturbance of others . . .

[Thorpe 2537]

Charles II, Commission Constituting a President and Council for New Hampshire, September 18, 1680:

> . . . And above all things we do by these prsents will, require & comand Our said Councell to take all possible care for ye discountenancing of vice, & incouraging of vertue & good living; that by such examples ye infidel may be invited & desire to partake of ye Christian **Religion**, & for ye greater ease & satisfacc'on of our sd loving subjects in matters of **Religion** We do hereby will, require & com'and yt liberty of **conscience** shall be allowed unto all protestants; & yt such especially as shall be conformable to ye rites of ye Church or Engld shall be particularly countenanced & incouraged. . . .
>
> [Thorpe 2448]

Fundamental Constitutions of East New Jersey, 1683:

> [Article 16:] All persons living in the Province who confess and acknowledge the one Almighty and Eternal God, and hold themselves obliged in **conscience** to live peaceably and quietly in a civil society, shall in no way be molested or prejudged for their **religious** persuasions

and exercise in matters of faith and worship; nor shall they be compelled to frequent and maintain any **religious** worship, place or ministry whatsoever:
[Thorpe 2579-80]

William and Mary, Charter of Massachusetts Bay, October 7, 1691:

> . . . and to dispose of matters and things whereby our Subjects inhabitants of our said Province may be **Religiously** peaceably and Civilly Governed Protected and Defended soe as their good life and orderly Conversation may win the Indians Natives of the Country to the knowledge and obedience of the onely true God and Saviour of Mankinde and the Christian Faith which his Royall Majestie our Royall Grandfather king Charles the first in his said Letters Patents declared was his Royall Intentions And the Adventurers **free** Possession to be the Princepall end of the said Plantation And for the better secureing and maintaining Liberty of **Conscience** hereby granted to all persons at any time being and resideing within our said Province or Territory as aforesaid . . . [Thorpe 1882-83]

William Penn, Charter of Privileges for Pennsylvania and Delaware, October 28, 1701:

> [Article 1:] Because no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged

of the Freedom of their **Consciences,** as to their **Religious** Profession and Worship: And Almighty God being the only Lord of Conscience, Father of Lights and Spirits; and the Author as well as Object of all divine Knowledge, Faith and Worship, who only doth enlighten the Minds, and persuade and convince the Understandings of People, I do hereby grant and declare, That no Person or Persons, inhabiting in this province or Territories, who shall confess and acknowledge One almighty God, the Creator, Upholder and Ruler of the World; and profess him or themselves obliged to live quietly under the Civil Government, shall be in any Case molested or prejudiced, in his or their Person or Estate, because of his or their **conscientious** Persuasion or Practice, nor be compelled to frequent or maintain any **religious** Worship, Place or Ministry, contrary to his or their Mind, or to do or suffer any other Act or Thing, contrary to their **religious** Persuasion.

[Thorpe 3077]

George II, Charter of Georgia, June 9, 1732:

. . . And for the greater ease and encouragement of our loving subjects and such others as shall come to inhabit in our said colony, we do by these presents, for us, our heirs and successors, grant, establish and ordain, that forever hereafter, there shall be a liberty of **conscience** allowed in the worship of God, to all persons inhabiting,

or which shall inhabit or be resident within our said province, and that all such persons, except papists, shall have a free exercise of their **religion**, so they be contented with the quiet and peaceable enjoyment of the same, not giving offence or scandal to the government.... [Thorpe 7731]

Virginia Bill of Rights, June 12, 1776:

[Section 16:] That **religion**, or the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of **religion**, according to the dictates of **conscience**; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other. [Thorpe 3814]

Pennsylvania Constitution, September 28, 1776:

[Declaration of Rights, Article 2:] That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own **consciences** and understanding: And that no man ought or of right can be compelled to attend any **religious** worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the

being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his **religious** sentiments or peculiar mode of **religious** worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of **conscience** in the free exercise of **religious** worship.

[Thorpe 3082]

New York Constitution, April 20, 1777:

[Article 38:] ...this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of **religious** profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this state, to all mankind: Provided, That the liberty of **conscience,** hereby granted, shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of this State. [Thorpe 2636-37]

Vermont Constitution, July 8, 1777:

[Declaration of Rights, Article 3:] That all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own **consciences** and understanding, regulated by the word of God; and that no man ought, or of

right can be compelled to attend any **religious** worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his **conscience**; nor can any man who professes the protestant **religion**, be justly deprived or abridged of any civil right, as a citizen, on account of his **religious** sentiment, or peculiar mode of **religious** worship, and that no authority can, or ought to be vested in, or assumed by, any power whatsoever, that shall, in any case interfere with, or in any manner controul, the rights of **conscience**, in the free exercise of **religious** worship; nevertheless, every sect or denomination of people ought to observe the Sabbath, or the Lord's day, and keep up, and support, some sort of **religious** worship, which to them shall seem most agreeable to the revealed will of God. [Thorpe 3740]

Massachusetts Constitution, March 2, 1780:

[Declaration of Rights, Article 2:] And no subject shall be hurt, molested or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own **conscience**; or for his **religious** profession of sentiments; provided he doth not disturb the public peace, or obstruct others in their **religious** worship. [Thorpe 1889]

New Hampshire Constitution, June 2, 1784:

[Bill of Rights, Article 5:] Every individual has a natural and unalienable right to worship God according to the dictates of his own **conscience,** and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping God, in the manner and season most agreeable to the dictates of his own **conscience**, or for his **religious** profession, sentiments or persuasion; provided he doth not disturb the public peace, or disturb others, in their **religious** worship. [Thorpe 2454]

Vermont Constitution, July 4, 1786:

[Declaration of Rights, Article 3:] That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own **consciences** and understanding, as in their opinion shall be regulated by the word of God; and that no man ought, or of right can be compelled to attend any **religious** worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his **conscience**; nor can any man be justly deprived or abridged of any civil right as a citizen, on account of his **religious** sentiments, or peculiar mode of **religious** worship; and that no authority can, or ought to be vested in, or assumed by any power whatsoever, that shall in any case interfere with, or in

any manner control the rights of **conscience**, in the free exercise of **religious** worship: Nevertheless, every sect or denomination of Christians ought to observe the Sabbath or Lord's day, and keep up some sort of **religious** worship, which to them shall seem most agreeable to the revealed will of God.
[Thorpe 3752]

South Carolina Constitution, June 3, 1790:

[Article VIII, Section 1:] The free exercise and enjoyment of **religious** profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind: Provided, That the liberty of **conscience** thereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State. [Thorpe 3264]

3. The First Congress

The House of representatives on August 24, 1789 requested Senate concurrence in its amendments to the constitution proposed in fulfillment of antifederalist importunities while ratifying. Article Third (which, as modified, later became Article First) read: "Congress shall make no law establishing **Religion**, or prohibiting the free exercise thereof, nor shall the rights of **conscience** be infringed."[3]

[3] Documentary History, op.cit., page 136.

The Senate considered this resolution of the House on September 3. A motion was made to substitute: "Congress shall not make any law, infringing the rights of **conscience**, or establishing any Religious Sect or Society." The motion failed.[4]

Another motion was made that Amendment III read thus: "Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of **conscience** be infringed." That motion also failed.[5]

Finally it was moved to adopt the House version conditioned upon striking: "Nor should the rights of **conscience** be infringed." This passed.[6]

On September 9, the Senate passed a motion (omitting reference to conscience) that read: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion...."[7]

The House and Senate on September 22 appointed conference committees, which approved the amendment in its present form.[8] Religion had made the jump from the early organic laws right into the Constitution. Conscience made a game try, but failed. So be it.[9]

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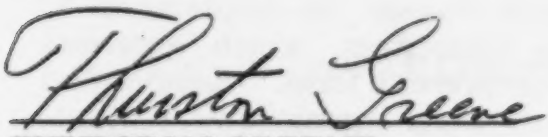
[4] id, page 151.
[5] id, page 151.
[6] id, page 151.
[7] id, page 166.
[8] id, page 168
[9] Madison may well have hoped to fight another day. He had written that: "Article V guards equally against that extreme facility which would render the Constittution too mutable, and that extreme difficulty which might perpetuate its discovered faults." The time has not passed. The Federalist No. 43, page 296. J.E. Cooke edition, Weslyan University Press, 1961, January 23, 1788.

CONCLUSION

The illumination intended by this brief might appear to favor the Archbishop as respondent. Not so. Not at the risk of warping the Constitution; lack of adequate briefing might result in a ruling that would plague generations yet unborn by adding "conscience" as a protected right. A decision for the city for the wrong reason would be a Pyrrhic victory. Whether the Fifth Circuit decision is affirmed or reversed, **conscience** is no concern of the Constitution.

The third question presented should be answered NO.

Respectfully submitted:



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